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Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT C. HERZFELD, in his individual and custodial capacity; MARSHALL BERNES, TEARS MCFARLAND, LTD., a Colorado Limited Partnership; CROKE-PATTERSON-CAMPBELL MANSION, LTD., a Colorado Limited Partnership; MALO MANSION, LTD, a Colorado Limited Partnership; and K.A.I. CASIMALLY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PODOLL & PODOLL, P.C.
RICHARD B. PODOLL, ESQ.
3530 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5635
Telephone: (303) 623-0800

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Probation Act, 18 U.S.C., Section 3651, violates the "Equal Protection" component of the Fifth Amendment to the United States Constitution because it fosters irrational classifications of the victims of criminal activity unrelated to any legitimate governmental interest, for the purposes of restitution.

B. Whether the United States District Court violated the "Due Process" clause of the Fifth Amendment to the United States Constitution by denying the claims of State Court Judgment Creditors to a share of a Court-established restitution fund without a hearing, and without consideration of the merits of the judgment creditors' claims..

C. Whether the Defendant in a criminal securities law prosecution can exclude certain recipients of restitution as part of a plea bargain?

D. Whether Petitioners were entitled to consideration and determination of their appeal to the United States Court of Appeals for the Tenth Circuit by a panel of three (3) judges.

PARTIES

Parties to Proceedings that were consolidated and decided with this case below, not named in the caption, are:

Appellees: Elizabeth Eken, William Johnson, William C. Lam.

Appellants: Elizabeth Eken, William Johnson.

Defendant: Trenton H. Parker.

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ROBERT C. HERZFELD, in his individual and custodial capacity; MARSHALL BERNES, TEARS MCFARLAND, LTD., a Colorado Limited Partnership; CROKE-PATTERSON-CAMPBELL MANSION, LTD., a Colorado Limited Partnership; MALO MANSION, LTD., a Colorado Limited Partnership; and K.A.I. CASIMALLY,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears in the appendix to this petition. The Order of the United States District Court for the District of Colorado, dated July 26, 1984, which was the Order reviewed by the Court of Appeals, is included in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1986. A timely Petition for Rehearing

and Motion for Partial Recall and Stay of Mandate were filed by Petitioners on November 10, 1986. The Petition for Rehearing was denied and the Motion to Stay Mandate was granted on January 16, 1987. This petition is filed within ninety (90) days of that date. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. 3651

28 U.S.C. 46

Fifth Amendment to the United States Constitution

STATEMENT OF THE CASE

On July 5, 1984 and July 26, 1984, the United States District Court for the District of Colorado entered Orders which prevented Petitioners from sharing in the distribution of an Eight Million Dollar ($8,000,000.00) restitution fund.[1] The restitution fund was the result of a plea bargain between the United States Government and Trenton Parker.

Trenton Parker defrauded hundreds of people between 1974 and 1981, in several fraudulent investment schemes. In 1980, the Securities and Exchange Commission successfully obtained an injunction restraining these continued illegal activities.[2] Subse-

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[1] See APPENDIX C

[2] See APPENDIX D, which contains the Complaint filed in *Securities and Exchanges Commission v. The International Mining Exchange, Inc., Mansions Properties Corporation, Mansion Properties Management Corporation, Trenton H. Parker & Associates, Inc., and Trenton H. Parker*, Civil Action No. 80K1198

quently, in 1981, and again in 1982, the government pursued the criminal conduct of Trenton Parker.[3]

For reasons of simplicity and economy, the United States Attorney sought indictments against Trenton Parker relating to only one of the fraudulent investment schemes. During the criminal trial, Trenton Parker and the government reached a plea bargain.[4] As part of the plea bargain, Trenton Parker paid all of his remaining fraudulently obtained monies into a restitution fund. In addition, an unwritten part of the plea bargain was that these Petitioners be denied the right to share in the restitution fund.

The restitution fund was established. Petitioners made claim for restitution. Petitioners were denied a hearing on their claims. Petitioners were ultimately denied any share of the restitution fund on the grounds that the schemes which victimized them were not the basis for the guilty pleas in the plea bargain agreement. Petitioners were instrumental in bringing Trenton Parker to justice. Ultimately Petitioners have been denied any recovery by the actions of the government.

Petitioners timely appealed the Orders of the United States District Court to the United States Court of Appeals for the Tenth Circuit. On October 27, 1986, the United States Court of Appeals for the Tenth Circuit affirmed the Orders of the United States District Court for the District of Colorado by decision of a two (2) Judge panel.[5]

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[3] *United States v. Trenton H. Parker and International Mining Exchange*, Civil Action Nos. 81CV122 and 82CR28

[4] See APPENDIX E

[5] See APPENDIX A

On November 10, 1986, Petitioners filed a Petition for Rehearing with the United States Court of Appeals for the Tenth Circuit. The Petition for Rehearing was denied on January 16, 1987. In its Order denying rehearing, the Tenth Circuit granted a partial stay of mandate and indicated that such stay would automatically be dissolved if Petitioners failed to petition for a Writ of Certiorari within ninety (90) days.[6]

This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C., Section 1254.

STATEMENT OF THE FACTS

From 1974 through 1981, Trenton Parker designed various fraudulent investments. Several fraudulent investments involved the purchase of historic mansions in Denver, Colorado, for the purported purpose of restoration and sale (the "Mansion Schemes"). Substantial appreciation and tax advantages were promised to the investors. The "tax advantages" never materialized. The appreciation never materialized. Even the principal investments were not seen again. They were converted by Trenton Parker to his own use.

At the same time that the Mansion Schemes were undertaken, Trenton Parker contrived a "Gold Tax Shelter Investment Program" (the "Gold Tax Shelter Scheme"). This scheme involved the sale of interests in supposed placer gold mines. Again, Trenton Parker promised appreciation and tax advantages. The al-

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[6] See APPENDIX B

leged tax advantages of the gold mining investments proved to have no validity. The tax benefits were ultimately disallowed. Again, the investments were converted by Trenton Parker to his own use.

In all of the fraudulent investments devised by Trenton Parker, the money was used for the purposes of Trenton Parker, not for the solicited purposes. The funds were commingled, and maintained no separate and distinct identity.

Petitioners were among the earliest investors, and were among the first to be defrauded. Between 1979 and 1983, Petitioners brought six (6) civil actions against Trenton Parker in State Court,[7] and were successful in obtaining Judgments in all cases. In 1980, Petitioner Herzfeld brought suit against Trenton Parker in Federal Court.[8] Petitioner Herzfeld also obtained Judgment against Trenton Parker in his Federal District Court lawsuit. At that time, Trenton Parker was financially fortified with the money of the defrauded investors. The initial litigation was vigorously defended, time consuming and expensive.

In September, 1980 the Securities and Exchange Commission brought a civil injunction suit (the "SEC

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[7] *Bernes v. Parker*; Denver District Court, 79CV8589. *Herzfeld v. Parker*; Denver District Court, Civil Action No. 80CV558. *Croke, Patterson, Campbell Mansion Ltd. v. Parker*; Denver District Court, Civil Action No. 81CV2624. *Malo Mansion Ltd. v. Parker*; Denver District Court, Civil Action No. 81CV2625. *Tears McFarlone Mansion Ltd. v. Parker*; Denver District Court, Civil Action No. 81CV2626. *Cassimally v. Parker*; Denver District Court, Civil Action No. 82CV1417.

[8] *Herzfeld v. Parker*; United States District Court for the District of Colorado, Civil Action No. 80K850.

Civil Action") against Trenton Parker. The SEC sought to enjoin all of the activities of Trenton Parker, including the Gold Tax Shelter Scheme and the Mansion Schemes. The SEC Civil Action, was resolved when Judge Kane entered Summary Judgment against Defendant Parker, restraining participation in all fraudulent investment schemes.

Subsequent to the commencement of the SEC Civil Action, the United States Attorneys instituted criminal proceedings against Trenton Parker. The United States Attorneys decided to prosecute Defendant Parker only for the Gold Tax Shelter Scheme. The prosecutorial decision not to seek indictments based upon the Mansion Schemes was attributed to the complexity and magnitude of the various schemes, and the corresponding difficulty of efficient prosecution.[9]

After the commencement of the criminal trial, Trenton Parker and the Government reached a plea bargain. The terms of the plea bargain required Trenton Parker to pay Six Million Two Hundred Thousand Dollars ($6,200,000.00) to the Court in order to create a restitution fund. This sum had been frozen in a Grand Cayman bank by *civil* process, and was of no use to Trenton Parker.

Trenton Parker desired to prevent the victims of the Mansion Schemes from receiving any part of the restitution fund. Trenton Parker and the United States Attorneys agreed to exclude Petitioners from

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[9] The basis of the prosecutorial decision was alleged to have been to simplify the criminal prosecution. The Tenth Circuit accepted this fact as true for purposes of its decision. See Order and Judgment of the United States Court of Appeals for the Tenth Circuit at Page 2, Section I (Appendix A).

the restitution fund. The monies were eventually transferred to the United States District Court for the District of Colorado, and the restitution fund was established.

Petitioners made claim for a share of the restitution fund. Petitioners alleged that they were victims of the criminal conduct of Trenton Parker; that their property was commingled within the restitution fund; and that their efforts were instrumental in bringing Trenton Parker to justice. On July 24, 1984, the United States District Court for the District of Colorado summarily denied Petitioners' claims. The District Court did not evaluate the claims of Petitioners on the merits, and did not afford these Petitioners a hearing.

No evidence was permitted concerning the sources of the monies contained in the restitution fund. No evidence was permitted in regard to the use of monies from prior or contemporaneous schemes to promote and support the Gold Tax Shelter Schemes. No evidence was permitted regarding the role played by the victims of the Mansion Schemes in exposing Trenton Parker, and making the Federal criminal prosecution possible. No evidence was permitted regarding the thousands of dollars spent by Petitioners in pursuing Trenton Parker prior to the SEC involvement, or the benefit ultimately received by the creditors favored by the prosecutorial discretion and by the plea bargain agreement.

The Mansion Scheme victims were part of a large scale securities fraud, reaching investors on a national scale, and encompassing several years. The monies obtained from all of Trenton Parker's different schemes were never segregated. Monies were taken

from one scheme and used by Defendant Parker to support and promote his next scheme. The recovered money was not derived solely from any particular scheme. The recovered money was the result of all of the fraudulent investment schemes. The schemes were different in subject, but they were the same in character, style and effect. The fraudulent investment schemes created a single class of victims: investors defrauded by Trenton Parker.

In its Orders entered on July 5, 1984 and July 26, 1984, the United States District Court for the District of Colorado ruled "the plea agreement alone gives shape to the pool of intended claimants."

All claims made by individuals who were not investors in the Gold Tax Shelter Scheme were mechanically disallowed without hearing or consideration.

REASONS FOR GRANTING THE WRIT

I. THE PRINCIPALS INVOLVED IN THIS CASE HAVE NATIONAL SIGNIFICANCE AND WOULD HAVE BROAD APPLICATION THROUGHOUT THE FEDERAL AND STATE JUDICIAL SYSTEMS.

Petitioners in this case are victims of criminal conduct. They seek vindication of important constitutional rights. This Court has prevented the excessive exculpation of those who commit criminal acts. In this case, this Court can advance the rights of the victims of criminal episodes.

A. THE PROBATION ACT, 18 U.S.C., SECTION 3651 IMPERMISSIBLY BALANCES THE RIGHTS OF VICTIM VS. CRIMINAL IN FAVOR OF THE CRIMINAL.

The United States District Court is authorized to order restitution as a condition of probation, by the provisions of 18 U.S.C. § 3651, which states in part:

> While on probation and among the conditions thereof, the defendant—
>
> . . .
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and . . .

Most of the Federal Circuit Courts of Appeals that considered the issue have held that the probation statute, 18 U.S.C., Section 3651, allows restitution only for victims of the specific crime for which the Defendant is convicted. See, e.g., *Fiore v. United States*, 696 F.2d 205 (2nd Cir. 1982); *United States v. Prescon Corp.*, 695 F.2d 1236 (10th Cir. 1982); *United States v. Taylor*, 305 F.2d 183 (4th Cir. 1962). This provision protects the rights of the criminal defendant. The defendant cannot be ordered to make restitution for crimes which are not proved.

An absolute prohibition, precluding restitution to victims of crimes for which there was no conviction, is not necessary to protect the constitutional rights of the criminal defendant. An absolute prohibition can unfairly prejudice the rights of some of the victims.

All of the crimes which can be prosecuted against a particular defendant are not always prosecuted. The crimes which are prosecuted do not all result in convictions where a plea agreement is accomplished. There is no demonstrable relationship between those crimes which result in a guilty plea pursuant to a plea agreement, and victims who deserve restitution. In fact, it is apparent that some of the more serious crimes are dismissed in a plea agreement.

In a plea bargain, the statute differentiates between those who are victims of the offense to which the defendant agrees to plead guilty and those who are victims of the offenses for which charges are dropped by the United States Attorney. The victims of offenses for which charges are dropped are not given an opportunity under the statute to show that they are entitled to restitution.[10]

Plea bargains are a common form of disposition in criminal matters. They are actually the *norm*.[11] Certainly, it is in the interest of judicial economy to promote pretrial disposition where feasible. In fact, the demands on the judicial system would be great if plea bargaining were materially reduced.[12] The plea bargain is an effective tool for judicial administration, and is most likely to remain a significant part of the criminal judicial process in the foreseeable future.

The pervasiveness of the plea bargains exacerbates the problems inherent in the prohibition within 18

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[10] This is similar to the infirmity which existed in *Jimenez v. Weinberger*, 417 U.S. 628, 635, 94 S.Ct. 2496, 2501, 41 L.Ed.2d 363, 370 (1974). In *Jimenez*, this Court struck down a portion of the Social Security Act, 42 U.S.C., Section 416(h)(3), stating:

> Their dilemma is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their "claim" to support and, hence, their right to eligibility.

Jimenez v. Weinberger, supra.

[11] Roughly ninety percent (90%) of all defendants plead guilty. Approximately eighty-five percent (85%) of federal cases are disposed by guilty plea. Bond, Plea Bargaining and guilty pleas, Second Edition. Clark Boardman Company, Ltd., New York, 1983.

[12] *Id.*

U.S.C. 3651.[13]

The scope of restitution in a multifaceted criminal episode is determined in part by an inadvertent screening process. The class of potential recipients is narrowed by the exercise of prosecutorial discretion, and by the consummation of the plea agreement. Prosecutorial discretion and the plea bargain are affected by factors which are unrelated to the rights of victims to restitution. In cases where a criminal episode has victimized hundreds, or even thousands of people, large numbers of victims can be denied restitution for reasons completely unrelated to the merits of their entitlement. "To permit a defendant who freely admits his or her guilt and the amount of loss caused thereby, to avoid making the aggrieved party at least economically whole is intolerable from a societal perspective." *Phillips v. United States*, 679 F.2d 192 (9th

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[13] The problems inherent in 18 U.S.C. 3651 (and in the Victim and Witness Protection Act, 18 U.S.C. 3579) in cases resolved by plea agreement have resulted in difficult decisions in the United States Court of Appeals, which have had to justify fair, warranted restitution orders against the inflexible, often unjust requirement of actual damage sustained by victims of the offense convicted.

The United States Courts of Appeals have allowed restitution in amounts exceeding those specified in the offense as charged. See *Phillips v. United States*, 679 F.2d 192 (9th Cir. 1982); *United States v. Tiler*, 602 F.2d 30 (2nd Cir. 1979); *United States v. Landay*, 513 F.2d 306 (5th Cir. 1975); *United States v. Taylor*, 305 F.2d 183 (4th Cir.), *cert. denied*, 371 U.S. 894 83 S.Ct. 193, 9 L.Ed.2d 126 (1962).

The Fourth Circuit has approved restitution in favor of joint fort feasors seeking contribution from the defendant. See *United States v. Barringer*, 712 F.2d 60 (4th Cir. 1983).

Cir. 1982). A consideration of the rights of the victims demands a more flexible restitution system.

B. THE VICTIMS OF CRIMINAL ACTIVITY ARE ENTITLED TO NO LESS DUE PROCESS PROTECTION THAN THE CRIMINAL DEFENDANT.

1. Victims of Criminal Conduct who have been Damaged have a Property Interest in Money Set Aside for Restitution.

United States Courts of Appeals have recognized that the criminal defendant is entitled to due process protections in the restitution process. See *United States v. Richard*, 738 F.2d 1120 (10th Cir. 1984); *United States v. Brown*, 744 F.2d 905 (2nd Cir. 1984); *United States v. Florence*, 741 F.2d 1066 (8th Cir. 1984); *United States v. Satterfield*, 743 F.2d 837 (11th Cir. 1984); and *United States v. Plisek*, 657 F.2d 920 (7th Cir. 1983). The criminal defendant has a property interest, even where the money involved, and subject to restitution, was stolen by the criminal defendant. See *United States v. Richard*, 738 F.2d 1120 (10th Cir. 1984); and *United States v. Florence*, 74l F.2d 1066 (8th Cir. 1984).

If the criminal defendant who has stolen the money has a property interest, then the victims who had the money stolen must also have a property interest in the stolen money. It would be unreasonable to grant a property interest in stolen money to the criminal who steals it, but not to the victim who has it stolen.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court stated:

> the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.

In this case, the claimed property interest is not some vague or abstract expectation. The restitution fund contains money belonging to these Petitioners.[14] Therefore, the Petitioners have a property interest in the restitution fund.

2. The Property Interest of Crime Victims Entitles Them to Notice and a Hearing.

A basic principle of procedural due process is that one cannot be deprived of a property interest without first being given notice and an opportunity to be heard. See *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

In *Mathews v. Eldridge*, 424 U.S. 319, 321, 96 S.Ct. 893, 896, 47 L.Ed.2d 18, 25 (1976), this Court stated:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interests, including the function involved in fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

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[14] Petitioners alleged facts were accepted as true by the Tenth Circuit Court of Appeals. See Tenth Circuit Opinion, Appendix A.

A consideration of the three (3) factors in the circumstances of this case supports Petitioners' claims for procedural due process.

The necessity of procedural due process protection is greater in this case where official action has adversely affected the position of Petitioners. The Government obtained the monies for the restitution fund from civil creditors after it had been frozen by the creditors, and rendered useless to Trenton Parker. The restitution fund as a practical matter was the exclusive means through which the victims of Trenton Parker could obtain recovery. These actions of the Government precluded or severely hampered normal post judgment collection from Trenton Parker.

The risk of erroneous deprivation here is also great. No factual testimony has ever been permitted to establish the Petitioners' right to share in the restitution. The factual basis of the criminal acts, the losses incurred and the source of the monies for repayment were never considered.

The government has a legitimate interest in conserving the resources of the Federal criminal justice system. However, as this Court stated in *Goldberg v. Kelly*, 397 U.S. 254, 261, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287, 295 (1970):

> . . . While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process.

The added expense incurred in affording these Petitioners a hearing would be minimal in comparison to the magnitude of the property interest involved. The requirements of Due Process compel notice and

a hearing to determine the right of crime victims to share in money set aside for restitution.

3. Petitioners Were Denied an Interest in Property Without Due Process of Law.

Petitioners were among the first victims of Trenton Parker. They were among the first to pursue Trenton Parker and call attention to his illegal activities. Petitioners are a group of approximately fifty (50) persons who have lost money to Trenton Parker, and have spent additional money pursuing Trenton Parker in legal proceedings. Petitioners ultimately prevailed in all of the civil litigation which they commenced, and were instrumental in calling attention to the illegal conduct of Trenton Parker, which precipitated the involvement of the Federal Government. The monies recovered by the government included some of the money of Petitioners.

The absolute prohibition against certain crime victims sharing in money set aside for restitution allows the criminal defendant to control the recipients of restitution in the context of a plea bargain. Petitioners in this case were expressly excluded from recovering any of their money by the desires of the defendant. It is intolerable to permit official action to condone the final, vengeful, malevolent desires of the criminal defendant.

In this case, Trenton Parker was in the middle of a criminal trial in which the case against him was very strong. The Six Million Two Hundred Thousand Dollars ($6,200,000.00) had been located by some of his crime victims in an off shore depository institution, and had been frozen. Trenton Parker had nothing to gain by allowing the criminal trial to continue.

In plea bargain negotiations, Trenton Parker expressed a desire to exclude Petitioners from sharing in the monies to be used for restitution. The United States Attorneys were primarily concerned with obtaining their conviction, therefore, they agreed. The circumstances of this case demonstrate how the rights of certain crime victims can be compromised by official action without any significant protection.

The rights of Petitioners were compromised in the prosecutorial decisions made by the United States Attorneys. However, the problem with allowing a sophisticated criminal defendant to exclude certain crime victims from restitution through the plea bargaining process is clearly illustrated.

The Petitioners were deprived of their property without any consideration of their right to share in restitution proceeds, as a result of the absolute prohibition in 18 U.S.C. 3651. The statutory threshold of their right to share in restitution proceeds was determined by the United States Attorneys, without any consideration for Petitioners' rights. It is clear in this case that even if Petitioners were not excluded by the prosecutorial decision, they would have been excluded from sharing in restitution by virtue of the expressed desires of the criminal defendant in the plea bargain process. This taking from Petitioners without Due Process of Law was a violation of Petitioners' constitutional rights under the Fifth Amendment to the United States Constitution.

C. THE PROBATION ACT, 18 U.S.C. §51, VIOLATES PETITIONERS' EQUAL PROTECTION RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The due process clause of the Fifth Amendment contains within it an equal protection component. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610, reh. den. 420 U.S. 966, 95 S.Ct. 1363, 43 L.Ed.2d 446 (1975); *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). It is a denial of due process of law under the Fifth Amendment if the United States Government engages in activities that would constitute a denial of equal protection under the equal protection analysis of the Fourteenth Amendment. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173, reh. den. 431 U.S. 960, 97 S.Ct. 2688, 53 L.Ed.2d 279 (1977); *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964). Accordingly, it is a violation of the Fifth Amendment to the United States Constitution if similarly situated individuals are accorded unreasonably disparate treatment under the laws of the United States.

The guarantee of equal protection of the law is that all persons under like circumstances and conditions shall be treated alike, in the absence of a justification for treating them differently. *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459, 57 S.Ct. 838, 81 L.Ed. 1223 (1937); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 7 Ohio Ops 146,

106 A.L.R. 1476 (1936). Similarly situated individuals must receive similar treatment, regardless of the size or nature of their class.

> Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of the right permitted to be worked against, a larger class.

Truax v. Corrigan, 257 U.S. 312, 333, 42 S.Ct. 124, 130, 66 L.Ed. 254, 263, 27 A.L.R. 375 (1921).

This Court has consistently required that the classification must be rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 667 L.Ed.2d 186 (1981); *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). Although the rational basis standard is relatively deferential, the standard is not a toothless one. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 439, 102 S.Ct. 1148, 1159, 71L.Ed.2d 265 (1982).

The Circuit Courts have recognized that the purpose of 18 U.S.C., Section 3651, under which the restitution fund in the instant case was created, is protecting the public and rehabilitating the defendant. See, e.g., *United States v. Hussong*, 778 F.2d 567 (10th Cir. 1985); *Fiore v. United States*, 696 F.2d 205 (2nd Cir. 1982); *United States v. Margala*, 662 F.2d

622 (9th Cir. 1981); *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979). The classification of victims according to the results of a plea bargain is not related to the protection of the public, or to the rehabilitation of the defendant.

In this case, the criminal Defendant, with the agreement of the United States Attorneys, used the Probation Act to deny Petitioners the right to restitution from the government-controlled assets of Trenton Parker. The prosecutorial decision resulted in the classification. The plea agreement between the United States Attorneys and Trenton Parker required the classification. Petitioners were eliminated from the class of persons who were entitled to share in the distribution of the restitution fund.

The Petitioners in this action are victims of criminal action for whom the Probation Act was intended to provide protection. By deciding to prosecute only the crimes committed under the Gold Tax Shelter Scheme, the United States Attorneys allowed those victims to obtain recovery, while those victims defrauded through the Mansion Schemes were allowed to recover nothing. The prosecutors in deciding which crimes to prosecute, did not consider the restitution limitations which they were creating. The classification created under the restitution statute does not protect the public, but rather protects a class of victims at the expense of another class of victims. The classification is irrational, and was unintended by the United States Attorneys when the prosecutorial decision was made.

The classification is unrelated to any legitimate state interest. The state may have an interest in limiting the scope of post-trial criminal proceedings.

However, the time and expense of an additional hearing is not the sort of official burden which justifies the automatic, perhaps unintended, classification between groups of otherwise indistinguishable victims. See *Goldberg v. Kelly, supra* (in the context of Due Process).

The Probation Act has not served the purpose of rehabilitating the criminal Defendant in this case. Trenton Parker has been allowed to use the Act, with the assistance or acquiescence of the United States Attorneys, to perpetuate his fraudulent intent against these Petitioners. By expressly foreclosing from restitution all victims of criminal activity for which convictions are not obtained because of the plea bargaining process, the Probation Act violates the equal protection component of due process. The classification created by 18 U.S.C. 3651 is not rationally related to a legitimate state interest and violates Petitioners' right to equal protection of the law as guaranteed by the Fifth Amendment to the United States Constitution.

D. PETITIONERS ARE ENTITLED TO A REHEARING WHERE A PANEL OF ONLY TWO JUDGES HAD MEANINGFUL PARTICIPATION IN THEIR APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

28 U.S.C., Section 46(b) states:

> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each *consisting of three judges*, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that

> court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, *not less than three*, who constitute a panel. [Emphasis Added.]

In their Petition for Rehearing submitted to the United States Court of Appeals for the Tenth Circuit, these Petitioners asked for a rehearing based upon the fact that their appeal was decided by a panel of only two (2) judges. In response to Petitioners' argument, the Court of Appeals stated in its Order dated January 16, 1987:

> We are cognizant of Appellants' objection to a decision by a panel of less than three judges. These matters were originally submitted to a three judge panel for consideration and disposition. Unfortunately, the death of Judge Doyle while these cases were under advisement required that we proceed, of necessity, as a quorum pursuant to 28 U.S.C., Section 46(d).

28 U.S.C., Section 46(d), states:

> (d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

The Honorable William E. Doyle, former Senior Circuit Judge for the Tenth Circuit Court of Appeals, was a member of the panel originally assigned to Petitioners' appeal to the Tenth Circuit. Unfortunately, Judge Doyle died on May 2, 1986. Petitioners did not even file their Opening Brief on Appeal until April 8, 1986. The United States of America, as Appellee before the Tenth Circuit, filed for and was granted extensions of time within which to file its Response Brief through May 27, 1986. Furthermore, with the permission of the Court of Appeals, the time for filing Appellants' Reply Brief was extended to June 10, 1986. Judge Doyle died before the issues on appeal had been fully briefed by the parties. Further, it does not appear, and there is no indication in the record to the contrary, that Judge Doyle even reviewed Petitioners' Opening Brief. It is apparent, however, that the remaining two (2) Judges were deprived of Judge Doyle's input and consultation relative to the issues Petitioners had raised by their appeal. The appeal was not finally determined until October 27, 1986.

Although Judge Doyle was originally assigned to a panel to hear Petitioners' appeal, he had no meaningful participation whatsoever. Since Judge Doyle's unfortunate death occurred prior to the conclusion of the briefing in this matter, there was ample time to assign an alternate Judge pursuant to the procedures set forth in 28 U.S.C., Section 46. The "necessity" of proceeding as a panel of two (2) was simply non-

existent. This is particularly true in light of the fact that the appeal was not decided until October 27, 1986, nearly six (6) months after Judge Doyle's death.

Certainly, 28 U.S.C., Section 46(d) provides an exception to the three (3) Judge requirement set forth in 28 U.S.C., Section 46(b). However, as Paragraph (d) is stated as an exception to the general rule, it should be interpreted narrowly. The cases in which a decision by only a quorum of a three (3) Judge panel have been upheld appear to support such a narrow reading and involve situations where the third Judge had at least some meaningful participation in the appeal. See, e.g., *Photo-Sonics, Inc. v. National Labor Relations Board*, 678 F.2d 121 (9th Cir. 1982) (case submitted to three (3) Judge panel pursuant to provisions of National Labor Relations Act was heard by a three (3) Judge panel, but one member resigned just prior to the issuance of the Board's opinion); *Minniefield v. State of Alabama*, 542 F.2d 947 (5th Cir. 1976) (three (3) Judges heard oral argument, but due to illness, the third Judge did not participate in the decision); *United States v. Allied Stevedoring Corp.*, 241 F.2d 925 (2nd Cir. 1957) (one (1) of three (3) Judges died after expressing his concurrence in the disposition adopted by the majority); *Tobin v. Ramey*, 206 F.2d 505 (5th Cir. 1953) (one (1) member of three (3) Judge panel was absent during oral argument, but participated in all other aspects of appeal and ultimately wrote the opinion in the case).

In the instant case, Judge Doyle did not have an opportunity to review the briefs, did not hear any oral argument, expressed no opinions or concurrence with the decision in the case, and had no participation in the decision making process which ultimately re-

sulted in a decision adverse to Petitioners. For all practical purposes, this case was not assigned to a three (3) Judge panel as required by statute.

With respect to the three (3) Judge District Court requirement for interlocutory injunctive orders in Interstate Commerce Commission decisions, the United States Supreme Court stated:

> The policy of requiring the deliberation of three judges in suits to enjoin the enforcement of Interstate Commerce Commission orders is thus a well-established one. It is grounded in the legislative desire to guard against ill-considered action by a single judge in the important and complex situations frequently presented by Commission orders. Such matters are deemed to warrant *the full deliberation* which a court of three judges is likely to secure. [Emphasis Added.]

Ayrshire Collieries Corporation v. United States, 331 U.S. 132, 136, 67 S.Ct. 1168, 1170, 91 L.Ed. 1391, 1394 (1947).

Although the Court in *Ayrshire, supra*, was interpreting a different statute, the policy behind the three (3) Judge requirement is similar. Obviously, the legislature intended appeals to be heard by a three (3) Judge panel, absent a necessity of proceeding as a quorum. Unfortunately, the legislative history of 28 U.S.C., Section 46, does not provide sufficient guidance. Nevertheless, to allow appeals to be briefed, heard, debated, and decided by a panel of only two (2) Judges would be to render meaningless the three (3) Judge requirement. The exception to the general rule which is carved out in 28 U.S.C., Section 46(d),

must not be interpreted in such a way as to entirely negate the policies underlying the three (3) Judge requirement in our Appellate Courts.

CONCLUSION

For these reasons, the Writ of Certiorari sought by Petitioners should issue, to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

PODOLL & PODOLL, P.C.
RICHARD B. PODOLL, ESQ.
Attorneys for Petitioners
3530 Republic Plaza
370 Seventeenth Street
Denver, Colorado 80202-5635
Telephone: (303) 623-0800

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 84-2090
(D.C. No. 81-00122)
(D. Colo.)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TRENTON H. PARKER,
Defendant,

ROBERT C. HERZFELD, in his individual and custodial capacity; MARSHALL BERNES, TEARS McFARLANE, LTD., a Colorado Limited Partnership; CROKE-PATTERSON-CAMPBELL MANSION, LTD., a Colorado Limited Partnership; MALO MANSION, LTD., a Colorado Limited Partnership; and K.A.I. CASIMALLy,
Claimants-Appellants,

WILLIAM C. LAM,
Receiver-Appellee,

ELIZABETH EKEN, WILLIAM JOHNSON, et al.,
Claimants-Appellees.

No. 84-2103
(D.C. No. 81-00122)
(D. Colo.)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TRENTON H. PARKER,

Defendant,

ELIZABETH EKEN, WILLIAM JOHNSON, et al.,

Claimants-Appellants,

WILLIAM C. LAM,

Receiver-Appellee.

FILED
OCT 27 1986

ORDER AND JUDGMENT

Before HOLLOWAY, Chief Judge, and BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of these appeals. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

These appeals are from orders of the district court disallowing claims to the funds held in the special receivership approved by this court in Herzfeld v. District Court, 699 F.2d 503 (10th Cir.), *cert. denied,* 464 U.S. 815 (1983). All of the appellants were investors in one of defendant's fraudulent investment plans. The rejected claims were either for losses incurred in an investment scheme other than the scheme on which the criminal charges were based or for attorney's fees incurred in civil actions against defendant, or both. For the reasons which follow, we affirm the district court's judgment in all respects.

I.

As a preliminary matter, the receiver, who was allowed to file a brief in these cases, argues that there is no basis in the record for many of the factual assertions made by the appellants. The appellants respond that this is because they were not allowed an opportunity to present evidence on the facts underlying their claims. We resolve this dis-

pute by accepting the facts as alleged on appeal as true. Our disposition of these cases, however, does not necessarily turn on the facts which the appellants emphasize, but instead turns on our determination of whether there is sufficient support in the law and undisputed facts for the district court's conclusions. Also, although the district court cited *Herzfeld, supra,* for support in its order denying the appellants' claims, we have already determined that that opinion did not resolve the issues raised in these cases (*see* the order and judgment denying the receiver's motion to affirm, filed March 7, 1986).

II.

The general standard of review for restitution orders is that such orders will not be overturned absent an abuse of discretion. United States v. Richard, 738 F.2d 1120, 1122 (10th Cir. 1984).

III.

Turning to the merits, first we will address the appellants' arguments that the preclusion of their claims violated the principles of due process and equal protection. The appellants assert that the creation of the restitution fund created a property right to recover from that fund for all investors in all of defendant's schemes. We reject that argument. Furthermore, we perceive no equal protection violation on the facts of these cases. The distinctions drawn between participants and nonparticipants to the fund are all rationally based on valid governmental goals.

Next, we believe that the district court's limitation of both the pool of claimants to only those defrauded in the gold tax shelter program and the amount of claims to that amount actually lost through investment therein was not an abuse of discretion.

The plea agreement and the transcripts of the change of plea hearing and the sentencing all make explicit reference to the goal of returning the proceeds of the gold tax shelter program to the investors therein and no one else. Indeed, we believe that no other result was possible. Under the relevant statute, the district court could *only* order restitution to "aggrieved parties for actual damages or loss *caused by the offense for which conviction was had.*" 18 U.S.C. § 3651 (emphasis added). *See* United States v. Hussong, 778 F.2d 567, 570 (10th Cir. 1985) (sentencing judge's discretion does not allow order of restitution beyond the express authorizations contained in § 3651). In other words, a restitution order must be "offense specific." We hold that this limitation on restitution, together with the record of the plea agreement, supports the district court's disallowance of the claims of investors in fraudulent schemes other than the gold tax shelter program.

The attorney's fees issue requires only a slightly different analysis. The attorney's fees issue does not focus on the *parties* participating in the fund, but focuses instead on the *amount* of restitution allowed a proper party, so that the limitations of § 3651 are not controlling. Nevertheless, in light of the sentencing judge's "broad discretion to impose conditions of probation reasonably related to protecting the public," *Hussong, supra* at 569-70, we hold that it was not an abuse of discretion for the district court to decide that it would be most fair to divide the limited fund in a pro rata fashion among the victims of the offense without consideration of funds otherwise expended in an attempt to recover their investments.

The appellants' last group of arguments concern whether the limitations on participation "shock the conscience" because they resulted from defendant's purposeful manipulation of the government to that conclusion. We reject this argument outright. The ultimate limitation on which parties could participate in the fund was determined at the time the charges were brought. Even accepting the

appellants' factual assertions as true, there was no indication that the decision to prosecute defendant only for the gold tax shelter program was anything but an appropriate exercise of prosecutorial discretion. As to the preclusion of attorney's fees claims, the record supports the conclusion that the district court exercised its independent judgment upon consideration of the parties' written arguments.

The judgments of the United States District Court for the District of Colorado are AFFIRMED. *See* 10th Cir. R. 17(b).

The mandates shall issue forthwith.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX B

JANUARY TERM - January 16, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, and Honorable James E. Barrett, Circuit Judge, United States Court of Appeals

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No. 84-2090

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT C. HERZFELD, in his individual and custodial capacity; MARSHALL BERNES, TEARS McFARLANE, LTD., a Colorado Limited Partnership; CROKE-PATTERSON-CAMPBELL MANSION, LTD., a Colorado Limited Partnership; MALO MANSION, LTD., a Colorado Limited Partnership; and K.A.I. CASIMALLY,
Claimants-Appellants,

WILLIAM C. LAM,
Receiver-Appellee,

ELIZABETH EKEN, WILLIAM JOHNSON, et al.,
Claimants-Appellees.

No. 84-2103

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ELIZABETH EKEN, WILLIAM JOHNSON, et al.,
Claimants-Appellants,

WILLIAM C. LAM,

Receiver-Appellee.

These matters are before the court on appellants' petition for rehearing and motion for partial recall and stay of the mandate.

The petition for rehearing is denied. We are cognizant of appellants' objection to a decision by a panel of less than three judges. These matters were originally submitted to a three-judge panel for consideration and disposition. Unfortunately, the death of Judge Doyle while these cases were under advisement required that we proceed, of necessity, as a quorum pursuant to 28 U.S.C. § 46(d).

As we understand appellants' motion to partially recall and stay the mandate, appellants may seek review or certiorari but have no objection to immediate distribution of the restitution fund to the extent it exceeds the sum of $800,000. To permit prompt distribution of the restitution fund, we modify the mandate issued October 27, 1986, as indicated below.

The district court is authorized to permit immediate, pro rata distribution of the restitution fund to the extent it exceeds $800,000. Distribution of the remaining $800,000 is stayed for ninety days in order to permit an application for certiorari. If the application is timely made, this stay shall remain in force until disposition by the Supreme Court. The stay granted by this order shall automatically be dissolved if appellants fail to seek certiorari within ninety days.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 81-CR-122-1

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TRENTON H. PARKER,

Defendant.

FILED
JUL 26 1984

ORDER

The purpose of this order is to state comprehensively the court's findings regarding which of the claims made against the fund in receivership created in 81-CR-122 as a vehicle for restitution to individuals defrauded by defendants Trenton Parker and International Mining Exchange, Inc. ("IME") will be allowed and which will be disallowed.

My overriding concern in reviewing the pending claims is to effect the terms of the plea agreement, accepted by Judge Winner and approved by the Tenth Circuit Court of Appeals, which gave rise to the receivership. This concern has two major implications for the scheme of distribution. First, because the receivership is a creature of the plea agreement entered in the criminal action and is intended to provide a method for winding up the disposition of the criminal proceedings, the receivership must be treated distinctly from the various civil actions litigated or currently pending against Parker and IME. Second, the

plea agreement alone gives shape to the pool of intended claimants. The agreement provides that the funds deposited by Parker into the Colorado receivership from the Grand Caymen Bank as part of the plea agreement would be used for pro-rata restitution to those who had been defrauded through IME's "Gold Tax Shelter Investment Program," less the necessary costs of administering the receivership.

The other lodestar that has guided my examination of the claims asserted is my sense that the fairest method for dividing this limited fund is pro-rata restitution measured against the actual out-of-pocket amount expended by each investor-claimant. In other words, it is my judgment that the amount of restitution is appropriately computed on the basis of the sum each investor-claimant actually had at risk in the "Gold Tax Shelter Investment Program."

Upon these principles, being satisfied that the receiver has taken more than adequate steps to advise potential claimants of their rights and obligations with respect to the fund in receivership, and having heard all objections to the pending claim, it is

ORDERED:

1. Claims for expenses and attorney's fees incurred in various other civil cases unrelated to the criminal matter are disallowed.

2. Claims made by individuals who were not investors in the International Mining Exchange "Gold Tax Shelter Investment Program" are disallowed.

3. The claim of Robert A. Brandt for this actual investment of $30,000 is allowed, but his claim for assignment of $75,000 from RFB Petroleum is disallowed.

4. The claim of Benjamin Chavit for his actual investment of $8,000 is allowed, but his claim for interest in the amount of $4,800 is disallowed.

5. The claim of Frank McGarry is allowed only to the extent of his $5,000 actual investment and is disallowed in all other respects.

6. The claims of James Henningsen, James Holson, and Mark Roggen are tentatively allowed. If after oral and written notification by the receiver of the consequences of noncompliance, these claimants fail to provide their social security numbers to the receiver within 20 days after receipt of notice, the claims will be disallowed.

7. The claims of Gilbert Hardie, Harold Kline, and Sterling LeMaster, whose checks representing an investment in IME were stopped before credit was given on them, are disallowed.

8. The claim of Larry Hercules is withdrawn and disallowed by agreement.

9. Claims of individuals who have not opted out of the class in *Elizabeth Eken v. International Mining Exchange,* Civil Action No. 81-3990 in the United States District Court for the District of New Jersey ("the New Jersey class action"), but have not affirmatively filed claims in this action are barred from recovery of their pro-rata share in the fund held in receivership.

10. Claims of individuals who received a partial rebate of their investment are disallowed to the extent of that partial rebate. The claims are allowed to the extent of the amount actually at risk.

11. Claims of individuals that were received by the receiver after April 2, 1984, are disallowed pursuant to the terms of the order and notice entered in this action on February 1, 1984.

12. The claim filed by counsel for the New Jersey class action in November 1983 will be considered an adequate formal claim as of the that date with respect to those investors who had valid claims and were part of the class

action and who subsequently perfected their claims by notice to the receiver.

13. Claims for refund of specific broker's commissions paid by IME investors, as listed on Exhibit BB to the Receiver's Report on Status of Claims filed May 15, 1984, attached, are disallowed.

14. Claims of individuals who received commissions paid by IME for sale of IME investments are disallowed to the extent of the amount received from IME and allowed as to the remaining portion, if any, of their investment.

It is

FURTHER ORDERED that, finding proper notice has been given and adequate measures taken in an effort to locate addresses for all known investors in the IME, the names on Exhibit DD to the Receiver's Report on Status of Claims filed May 15, 1984, attached, are to be stricken from the Receiver's Master List of Claimants.

FURTHER ORDERED that the receiver shall file forthwith an application for fees and expenses with a notice that objections thereto must be filed in writing by a date certain not later than 20 days after filing of the application. The notice shall be served by the receiver on all interested parties. Final disbursement of the funds in receivership shall await the court's determination of the application and an award of fees and expenses to the receiver.

FURTHER ORDERED that the motion for stay of disbursal of funds filed by Trenton Parker is denied.

FURTHER ORDERED that copies of the order set forth above shall be served by the receiver upon all interested parties, and he shall further give notice of disallowance to all claimants whose claims have been disallowed.

Dated at Denver, Colorado, this 26th day of July, 1984.

BY THE COURT:

/s/ John P. Moore
John P. Moore, Judge
United States District Court

OTHER EXPENSES - BB (Brokers' commissions)

CLAIMANT	NAME	AMOUNT CLAIMED
A-12	Kewal Aggarwal	$ 680.00
A-13	Indergit Aggarwal	680.00
A-57	Henry Avon	408.00
B-30	Robert Benz	544.00
B-12	Rocco Barilla	136.00
D-27	Walfred C. Dick	272.00
G-23	Francis R. Gay	136.00
G-29	John A. Gellmann	1,000.00
H-16	Karl Hansen	680.00
H-57	Dan Hinkle	272.00
H-60	Thomas M. Hinton	544.00
H-92	Edward J. Hughes, Estate	2,980.00
I-5	Garvin Ivans	128.00
K-11	Julius Kanzel	408.00
M-5	Dennis Madigan	272.00
M-16	Leon Malachinski	816.00
M-43	Michael Mavrakis	136.00
M-45	Franklin B. May	135.00
M-49	Reed McCauley	408.00
M-62	Ronald W. McGovern	340.00
M-104	Richard Morris	272.00
M-111	Angelo Mozilo	408.00
M-114	Willard Mullins	1,360.00
N-27	Barnard Novak	136.00
O-12	David Overbay	544.00
R-10	John Rask	136.00
R-23	Phyllis Reierson	500.00
S-95	Carl Soreco	816.00
S-100	Harvey Spann	408.00
W-32	Wernecke (Dale) Enterprises	1,360.00
		$16,915.00

EXHIBIT BB

BAD ADDRESSES - DD

CLAIMANT #	NAME	AMOUNT OF CLAIM
B-8	Donald Ballard	$ 2,000
B-43	Joseph Bibeau	5,000
B-58	William Bomont	5,000
B-88	Chandler G. Brown	4,000
B-89	Edward R. Brown	1,000
B-102	Joseph C. Bureau	5,000
G-81	Robert Grimes	5,000
H-10	Michael Hamel	2,000
H-67	Robert Holden	6,000
J-5	Robert S. Jacobson	19,900
M-67	Alexander McKinley	6,000
M-87	Mary Miller	4,000
M-124	Robert L. Myers	2,000
O-1	Francisco Obsenares	5,000
P-2	Thomas Padberg	2,000
P-9	Richard Parks	2,000
P-46	Kenneth J. Pine	6,000
Q-1	Ronald B. Quackenbush	10,000
R-50	Marvin Romero	10,000
R-18	Charles Reed	6,000
R-30	Tae Rhee	5,000
R-59	Jill Rosenberg	2,000
R-82	William Ratcliff	4,000
S-19	David Schmidt	2,000
V-9	Richard P. Versoi	4,000
W-10	Edward Walsh	5,000
W-53	N.C. Wilson	6,000
		$135,900

EXHIBIT DD

I certify that I mailed a copy of the attached to the following:

Dated: 7/26/84 JAMES R. MANSPEAKER, CLERK

By /s/ Jean West

Deputy Clerk

Richard N. Stuckey, Esq.
600 S. Cherry, #6420
Denver, Colorado 80222

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLORADO

CIVIL ACTION FILE NO 80-K-1198

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,

v.

THE INTERNATIONAL MINING EXCHANGE, INC., MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, TRENTON H. PARKER & ASSOCIATES, INC., and TRENTON H. PARKER

Defendants.

COMPLAINT FOR INJUNCTION AND OTHER EQUITABLE RELIEF

It appears to the plaintiff, SECURITIES AND EXCHANGE COMMISSION, that the defendants have engaged, are engaged, and are about to engage in acts and practices which constitute and will constitute violations of the federal securities laws, and rules promulgated thereunder, as specified hereinafter:

The plaintiff, SECURITIES AND EXCHANGE COMMISSION ("COMMISSION"), alleges that:

1. Defendants THE INTERNATIONAL MINING EXCHANGE, INC., MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, TRENTON H. PARKER & ASSOCIATES, INC., and TRENTON H. PARKER, an individual, have engaged, are engaged, and are about to engage in

acts and practices which constitute and will constitute violations of Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, as amended ("Securities Act") [15 U.S.C. §§ 77e(a), 77e(c), and 77q(a)], and Section 10(b) of the Securities Exchange Act of 1934, as amended ("Exchange Act") [15 U.S.C. § 78j(b)], and Rule 10b-5 promulgated thereunder [17 CFR § 240.10b-5].

2. Defendants TRENTON H. PARKER & ASSOCIATES, INC. and TRENTON H. PARKER have engaged, are engaged, and are about to engage in acts and practices which constitute and will constitute violations of Sections 15(b) and 17(a) of the Exchange Act [15 U.S.C. §§ 78o(b) and 78q(a)] and Rules 15b3-1 and 17a-5 promulgated thereunder [17 CFR §§ 240.15b3-1 and 240.17a-5].

JURISDICTION AND VENUE

3. Plaintiff, pursuant to Section 20(b) of the Securities Act [15 U.S.C. § 77t(b)] and Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)], brings this action to enjoin such acts and practices.

4. Plaintiff, pursuant to authority granted it by Section 23(a)(1) of the Exchange Act [15 U.S.C. § 78w(a)], promulgated the rules referred to herein, included in paragraphs 1 and 2 above. All such rules were in effect at all times material to the acts and practices referred to herein and remain in effect.

5. This Court has jurisdiction over this action pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27 of the Exchange Act [15 U.S.C. § 78aa].

6. Venue in this action properly lies in the District of Colorado in that defendant TRENTON H. PARKER is a resident of Denver, Colorado, each of the corporate defendants is a Colorado corporation and/or has its principal place of business and corporate headquarters in Denver, Colorado, and the acts and transactions constituting

the alleged violations, for the most part, occurred within this District.

USE BY DEFENDANTS OF FEDERAL JURISDICTIONAL MEANS

7. The defendants have each used, and caused to be used, the mails and means or instrumentalities of interstate commerce in the conduct of the within described business and in the acts and practices complained of herein.

DEFENDANTS

8. Defendant THE INTERNATIONAL MINING EXCHANGE, INC. ("MINING") is a Colorado corporation with its principal offices at 800 Pennsylvania Street, Denver, Colorado 80203. MINING was incorporated in Colorado in January, 1977, under the name Trenton H. Parker and Associates Natural Resources Corporation. Articles of amendment changing the name to THE INTERNATIONAL MINING EXCHANGE, INC. were filed with the Colorado Secretary of State on October 11, 1979. TRENTON H. PARKER is president, treasurer, sole shareholder, and control person of MINING. MINING has its principal place of business within the state of Colorado.

9. Defendant MANSION PROPERTIES CORPORATION was incorporated as a Colorado corporation in September, 1974, had its principal place of business in Denver, Colorado, and was suspended by the Colorado Secretary of State on December 6, 1977 for failure to comply with statutory requirements. TRENTON H. PARKER is an incorporator, director, president and principal shareholder of this corporation.

10. Defendant MANSION PROPERTIES MANAGEMENT CORPORATION was incorporated as a Colorado corporation in August, 1975, had its principal place of business in Denver, Colorado, and was suspended by the

Colorado Secretary of State on December 6, 1977 for failure to comply with statutory requirements. TRENTON H. PARKER is an incorporator, director, president and principal shareholder of this corporation.

11. Defendant TRENTON H. PARKER & ASSOCIATES, INC. is a Delaware corporation which qualified to transact business in Colorado by a Certificate of Authority dated February 24, 1975, issued by the Secretary of State for the State of Colorado. A Certificate of Revocation dated October 22, 1979, was issued to the corporation by the Colorado Secretary of State for failure to comply with applicable provisions of the statutes of Colorado, thereby revoking its authority to transact business in Colorado. TRENTON H. PARKER is president, vice-president, secretary, treasurer and sole owner of this corporation. PARKER registered this corporation as a broker-dealer with the plaintiff Securities and Exchange Commission. Such registration became effective on March 5, 1975 and remains in effect.

12. Defendant TRENTON H. PARKER ("PARKER") is a resident of the state of Colorado residing in Denver, Colorado. PARKER has maintained the State of Colorado as his principal place of residence and business during all times relevant to the transactions and activities described and complained of herein. Defendant PARKER is an incorporator, director, principal shareholder, and president of each of the defendant companies, and directed and controlled the affairs and business of each.

COUNT I

Violations by PARKER and THE INTERNATIONAL MINING EXCHANGE, INC. of Sections 5(a) and 5(c) of the Securities Act [15 U.S.C. §§ 77e(a) and 77e(c)]

SALE OF UNREGISTERED SECURITIES - THE GOLD TAX SHELTERED INVESTMENT PROGRAMS

13. Paragraphs 1 through 12 are hereby realleged and incorporated herein by reference.

14. Since about September, 1979, and continuing to the present, the defendants PARKER and THE INTERNATIONAL MINING EXCHANGE, INC. have been and are now offering for sale and selling securities, namely investment contracts in purportedly gold bearing properties located in the Paul Isnard area of French Guiana, South America, and in Alaska, and have been and are now, singly and in concert, directly and indirectly, aiding and abetting one another, making use of the means and instruments of transportation and communication in interstate commerce and of the mails to offer to sell and sell such securities, and are carrying such securities and causing them to be carried through the mails and in interstate commerce by means and instruments of transportation for the purpose of sale and delivery after sale.

15. No registration statement is in effect, nor has a registration statement been filed, with plaintiff COMMISSION under the Securities Act with respect to any of the securities described in paragraph 14 hereof.

16. By reason of the activities described in paragraphs 14 and 15 above, defendants PARKER and THE INTERNATIONAL MINING EXCHANGE, INC. have violated and are violating Sections 5(a) and 5(c) of the Securities Act.

COUNT II

Violations By TRENTON H. PARKER and THE INTERNATIONAL MINING EXCHANGE, INC. of Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 promulgated thereunder [17 CFR § 240.10b-5]

FRAUDULENT ACTS AND PRACTICES IN THE OFFER AND SALE OF GOLD TAX SHELTER INVESTMENT CONTRACTS

17. Paragraphs 1 through 12 are hereby realleged and incorporated herein by reference.

18. Commencing in or about September, 1979, and continuing to the date hereof, defendants TRENTON H. PARKER ("PARKER") and THE INTERNATIONAL MINING EXCHANGE, INC. ("MINING"), singly and in concert, directly and indirectly, knowingly and wilfully, aiding and abetting each other, have been and are offering for sale and selling securities, namely investment contracts in gold tax shelter investment programs based upon purported gold bearing properties located in the Paul Isnard area of French Guiana, South America, and Alaska, and, in connection therewith: have employed and are employing a device, scheme, and artifice to defraud purchasers of such securities; have engaged and are engaging in acts, practices, and courses of business which operated and are operating as a fraud and deceit upon purchasers of such securities; and have obtained and are obtaining money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made and are being made, not misleading. As part of and in furtherance of the aforesaid conduct, and to mislead investors into believing that the individuals, business entities, and banks named below had engaged in business transactions necessary to effect the purposes of the investments, PARKER and MINING falsely represented or are representing, or caused or are causing to be represented:

French Guiana

a. that PARKER and MINING were offering and selling investment contracts based upon mining concessions located in the Paul Isnard area of French Guiana, South America, by virtue of a real estate listing agreement executed in PARKER's favor by a so called John Claud Isnard ("Isnard"), purportedly president of a French company entitled Compagnie Miniere Paul Isnard Internationale de France with a

purported address of 15 Avenue Victor Hugo, Paris, France, and a purported telephone number of 502-1800, when, in fact: (1) no such individual or company exist and the said agreement was a sham; (2) neither Isnard nor Compagnie Miniere Paul Isnard Internationale de France has or ever has had an office at 15 Avenue Victor Hugo or a telephone number of 502-1800; (3) this address and telephone number are those of International Business Office Supplies ("IBOS"), an unrelated company; (4) there is no Paris telephone listing for either John Claud Isnard or Compagnie Miniere Paul Isnard Internationale de France; and (5) Compagnie Miniere Paul Isnard Internationale de France is not registered with the Registry of Compagnies in Paris.

b. that the International Monetary Exchange ("Monetary"), a Panama corporation, had stolen PARKER's and MINING's written and promotional materials regarding the said investment contracts and was fraudulently marketing a tax shelter investment program substantially identical to that offered by PARKER and MINING, when, in fact, the opposite is true, and the similarity in promotional materials of Monetary and MINING resulted from Parker copying and plagiarizing, and causing to be copied and plagiarized, Monetary's promotional materials, which led to a copyright infringement action and a resultant permanent injunction entered against PARKER and MINING by the United States District Court for the District of Colorado [Civil Action No. 79-F-1603].

c. that, as of December 10, 1979, MINING had terminated sales of the foregoing described investment contracts because the program was sold out, when, in fact, such sales were terminated as a direct result of a preliminary injunction issued on December 10, 1979 by the United States District Court for the Dis-

trict of Colorado in the copyright infringement action referred to in paragraph "b" above.

d. that individuals and business entities purchasing the said investment contracts would acquire: (1) a leasehold interest in the Paul Isnard concessions; (2) a federal income tax deduction for mining developmental expenses incurred for tax year 1979 equal to 500% of the amount paid to PARKER and MINING; and (3) opportunity to earn substantial profits from production of gold, when, in fact, PARKER and MINING had no legal authority or capacity through which investors could acquire any such leaseholds or tax deductions, or could profit from the production of gold.

e. that investors' funds received by PARKER and MINING had been placed into escrow accounts and payments made therefrom for mining developmental expenses, when, in fact, PARKER had not deposited and did not intend to deposit the funds into escrow accounts, but instead intended to and did deposit such funds into checking accounts to which he was sole signatory with unrestricted power as to withdrawal and use of such funds, and did, in fact, withdraw and divert funds from such accounts to accounts under his control in foreign countries, to salesmen for MINING as commissions, to a printing company for promotional materials, and to other uses unrelated to mining developmental expenses.

f. that he and MINING would arrange for sale of options to purchase gold to be mined from the purported leasehold interests of investors in the Paul Isnard concessions and the proceeds therefrom would be placed into escrow accounts, together with the investors' funds, and payment made therefrom to a mining or developmental company for mining developmental expenses, when, in fact, PARKER knew that options to purchase gold to be mined from the inves-

tors' leasehold interests would not be and were not sold; that payments would not be and were not received on behalf of investors for sales of such options; and, that investors' funds and proceeds from the sale of such options would not be and were not placed into escrow accounts and would not be and were not paid for mining developmental expenses.

g. that the investors' funds, together with proceeds from sales of the options to purchase gold, described in paragraph "f" above, had been deposited in escrow accounts in foreign banks, including the Banque de Paris et des Pays-Bas (Suisse) S.A., Zurich, Switzerland branch, and Wellington International Bank and Trust Limited, St. Vincent, West Indies, and that, in December 1979, such banks had issued cashier's checks purporting to convey the escrowed funds to mining companies as payment for mining developmental services to be rendered, said representations being accomplished in part by PARKER furnishing to investors:

(1) photocopies of purported cashier's checks issued by the Banque de Paris on which appeared the account number 636 10 00076 924, when, in fact, such photocopies were fabrications which PARKER constructed by cutting, pasting, and photocopying parts of checks of various banks, one such check being from his own bank account at the United Bank of Denver encoded with the numbers 102000076 924 636, which numbers he transposed to the order in which they appear on the purported Banque de Paris checks;

(2) photocopies of purported cashier's checks issued by Wellington International Bank and Trust Limited ("Wellington"), which cashier's checks could not have been and were not issued by Wellington because Wellington: (a) was a shell with no em-

ployees or facilities; (b) was not and never has been "in good standing" with the St. Vincent Trust Authority, Ltd. and thus did not have the legal capacity to engage in any banking services whatsoever; and (c) in fact, did not provide any of the banking services that PARKER and MINING represented were provided.

h. that representatives of Wellington had conducted a physical inspection of the Paul Isnard properties, had checked the transfer of title, and had forwarded to investors their "closing documents" when, in fact, Wellington was nothing more than a shell, had no employees or facilities, and thus had no ability to, and did not, perform such services.

i. that so called Katzswabe Mining & Engineering Companies, with a purported address of Avenue Paulista 807, Suite 1618-23 San Paulo, Brazil, a purported telephone number of 287-2932, and a purported Telex number of 1122-358, had received, by cashier's check issued by Wellington in December, 1979, advance payment for mining developmental work to be done on investors' mining claims in the Paul Isnard area, when, in fact, said payment was not received in that: (1) Wellington could not issue any checks for the reasons set forth in paragraph "g" above; (2) the address and telephone number given are those of a Brazilian organization named Brasilinterpart which has never heard of Katzswabe; (3) the Telex number given is that for Confrio, a food processing company; (4) there is no San Paulo telephone listing for Katzswabe; and (5) Katzswabe is not listed in the commercial registry of San Paulo, Brazil.

j. that so called Deutsche Kronen Mineralisch Anstalt ("Deutsche"), with a purported address of Rennweg 42-44, 8001, Zurich, Switzerland, a purported telephone number of 211 68 11, and a purported Telex

number of 55656, had purchased options to purchase gold to be mined from the Paul Isnard claims, when, in fact, said purchases did not occur in that: (1) Deutsche's purchase money for the options was purportedly transferred to developmental contractors by cashier's checks issued by the Banque de Paris and Wellington, which checks are fictitious as described in paragraph "g" above; (2) this address and telephone number are those of a temporary employment agency unrelated to Deutsche; (3) the Telex number is that of another company which has never heard of Deutsche; and (4) Deutsche is not listed in the Zurich Trade Registry;

k. other statements of similar purport and object.

Alaska

1. that purchasers of investment contracts from MINING based on leasehold interests in unpatented mining claims, namely the Lady Dee mining claims, located near Juneau, Alaska, would realize (1) a federal income tax mining developmental expense deduction for tax year 1979 equal to 500% of their investment and (2) the potential for substantial profit from gold to be mined, when, in fact, Parker knew that: (1) such a tax deduction would be fraudulent and impermissible because he did not intend to and did not, on behalf of investors, incur during tax year 1979 mining developmental expenses required for such a deduction by applicable statutes, rules, and regulations of the Internal Revenue Service; and (2) there were no proven reserves in the Lady Dee claims and therefore no reasonable basis for representing that there was potential for substantial profit or a basis for incurring mining developmental expense deductions.

m. that, upon payment by the investors to PARKER and MINING, and execution of "closing docu-

ments" furnished to investors by MINING, PARKER and MINING would arrange for sale of and sell options to purchase gold to be mined from the Lady Dee Mine, when, in fact, PARKER did not intend to and subsequently did not arrange for sale of any such options.

n. that the investors' funds, together with the proceeds from sale of the gold options, would be paid to a mining developmental contractor engaged by PARKER or MINING on behalf of investors for the purpose of developing the investors' leaseholds in the Lady Dee Mine, when, in fact, PARKER did not intend to and did not engage or pay any mining developmental contractor on behalf of investors for such a purpose.

o. that investors' funds, together with proceeds from the sale of the gold options, were paid to and deposited in Wellington International Bank and Trust Limited ("Wellington") as escrow agent which, in December, 1979, issued cashier's checks payable to a mining developmental contractor as payment for developmental services to be rendered at the Lady Dee claims, when, in fact, no such funds had been paid to and deposited in Wellington, no such cashier's checks were issued by Wellington, and Wellington, being a shell, had no legal capacity to and did not engage in any such banking activities, as more fully described in paragraph "g" above.

p. that representatives of Wellington had conducted a physical inspection of the Lady Dee claims, checked transfer of title, and forwarded to investors their "closing documents," when, in fact, Wellington, being a shell, had no employees, facilities or legal capacity to perform such services and did not perform such services.

q. that Aurum & Argentum, Ltd. ("Aurum"), a Canadian corporation with a purported address of 444 Robson Street, Vancouver, British Columbia, and a purported telephone number of 604-684-3111, had purchased, during December, 1979, options to purchase gold to be mined from the Lady Dee claims, when, in fact, *inter alia:* (1) photocopies of purported Wellington cashier's checks furnished by PARKER and MINING to investors as evidence that Aurum had purchased the gold options were false and fictitious; (2) no such company is located at the address given; and (3) the address and telephone number are those of a telephone answering service.

r. that so called Seagull Creek Silver, Ltd. ("Seagull"), with a purported address of 250 Palleser Square One, 125 9th Avenue S.E., Calgary, Canada, and a purported telephone number of 403-263-6393, had received, by cashier's checks issued by Wellington during December, 1979, payment for mining developmental work to be performed on the Lady Dee claims, when, in fact: (1) the documents evidencing such payments are fictitious and no such payments were ever made; (2) Wellington issued no such checks; (3) Seagull is not registered as an Alberta, Canada company; and (4) the address and telephone number given are those of a telephone answering and mail forwarding service.

s. other statements of similar purport and object.

19. In making, and causing to be made, the representations referred to in paragraph 18 above, and similar such statements, PARKER and MINING knowingly and wilfully omitted to state, and are omitting to state, and caused others to omit to state, and are causing others to omit to state, material facts necessary to make the statements made, in light of the circumstances under which they were

and are being made, not misleading, including, among other things:

a. that the representations referred to in paragraphs "17" and "18" above, which are hereby incorporated by reference, were false and misleading to the extent set forth therein.

b. that, on or about March 17, 1980, the Internal Revenue Service issued Revenue Ruling 80-72 which limits an investor to a tax deduction equal to his actual investment, and precludes the 500% deduction represented as being available to investors by PARKER and MINING.

c. that the so called "tax opinion" and "securities opinion" furnished to investors as part of MINING's promotional materials were not authored for MINING's gold tax shelter investment program and were instead copied and plagiarized virtually verbatim from Monetary's promotional materials.

d. that there was no reasonable basis for representing that either the Paul Isnard properties or the Alaskan claims had or have proven gold reserves.

e. that PARKER was named as a defendant to lawsuits filed in a Colorado state court by purchasers of the limited partnership interests in limited partnerships described in Counts III and IV of this complaint seeking to remove PARKER and companies controlled by him as general partners.

f. that there was a high degree of risk to purchasers of the above investment contracts offered and sold by PARKER and MINING.

g. other omissions of similar purport and object.

20. By reason of the activities described in paragraphs 18 and 19 above, PARKER and MINING violated Section

17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

COUNT III

Violations by PARKER, MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION and TRENTON H. PARKER & ASSOCIATES, INC. of Sections 5(a) and 5(c) of the Securities Act, [15 U.S.C. §§ 77e(a) and 77(e)(c)]

SALE OF UNREGISTERED SECURITIES IN THE OFFER AND SALE OF LIMITED PARTNERSHIP INTERESTS IN FOUR HISTORICAL MANSIONS

21. Paragraphs 1 through 12 are hereby realleged and incorporated herein by reference.

22. Commencing in or about September, 1974, and continuing thereafter, the exact dates being unknown, defendants PARKER, MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, and TRENTON H. PARKER & ASSOCIATES, INC. offered for sale and sold securities in the form of investment contracts, namely limited partnership interests in limited partnerships of which PARKER and/or either defendant MANSION PROPERTIES CORPORATION or defendant MANSION PROPERTIES MANAGEMENT CORPORATION was general partner, such limited partnerships being organized under the names Porter Mansion, Ltd., Malo Mansion, Ltd., Tears-McFarlane Mansion, Ltd., and Croke-Patterson-Campbell Mansion, Ltd. PARKER, MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, and TRENTON H. PARKER & ASSOCIATES, INC., singly and in concert, directly and indirectly, aiding and abetting one another, made use of the means and instruments of transportation and communication in interstate commerce, and of the mails, to offer to sell and sell such securities, and carried such securities

and caused them to be carried through the mails and in interstate commerce by means and instruments of transportation for the purpose of sale and delivery after sale.

23. No registration statement is in effect, nor has a registration statement been filed, with plaintiff COMMISSION under the Securities Act with respect to any of the securities described in paragraph 22 above.

24. By reason of the activities described in paragraphs 22 and 23 above, defendants PARKER, MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION and TRENTON H. PARKER & ASSOCIATES, INC. violated Sections 5(a) and 5(c) of the Securities Act.

COUNT IV

Violation by PARKER, TRENTON H. PARKER & ASSOCIATES, INC., MANSION PROPERTIES CORPORATION and MANSION PROPERTIES MANAGEMENT CORPORATION OF Section 17(a) of the Securities Act [15 U.S.C. § 771(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)], and Rule 10b-5 promulgated thereunder [17 CFR § 240.10b-5]

FRAUDULENT ACTS AND PRACTICES IN THE SALE OF LIMITED PARTNERSHIP INTERESTS IN MANSIONS

25. Paragraphs 1 through 12, 22 and 23 are hereby realleged and incorporated herein by reference.

26. During the period from about September, 1974, and continuing thereafter, the exact dates being unknown, defendants PARKER, MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, and TRENTON H. PARKER & ASSOCIATES, INC., singly and in concert, directly and indirectly, knowingly and wilfully, aiding and abetting each other, offered for sale and sold securities, namely limited partnership interests in limited partnerships entitled Por-

ter Mansion, Ltd. ("Porter"), Malo Mansion, Ltd. ("Malo"), Tears-McFarlane Mansion, Ltd. ("Tears"), and Croke-Patterson-Campbell Mansion, Ltd. ("Croke"), and in connection therewith: made use of the means and instruments of transportation and communication in interstate commerce, and of the mails; have employed and are presently employing a device, scheme and artifice to defraud purchasers and prospective purchasers of such securities; have been and are engaging in acts, practices and courses of business which operated and are operating as a fraud and deceipt upon purchaser and prospective purchasers of such securities; and have obtained money and property by means of untrue statements of material fact, and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As part of and in furtherance of the aforesaid conduct, Parker, individually and as president and control person of MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION and TRENTON H. PARKER & ASSOCIATES, INC.:

a. offered to sell and sold limited partnership interests in limited partnerships organized by PARKER for the purpose of purchasing, renovating, renting, and eventually selling historical mansions located in Denver, Colorado.

b. installed, in addition to himself, his wholly controlled corporations as general partners to the limited partnerships thereby assuring his control over the business affairs and disbursement of funds of the limited partnerships.

c. Represented, in a September, 1974 letter and otherwise, to offerees and purchasers of the limited partnership interests that purchasers of such interests:

(1) could reasonably expect a 25% to 50% annual cash return on their investments;

(2) could reasonably expect approximately 100% to 200% capital appreciation in six to nine months; and

(3) could reasonably expect to recover their investments by the end of the following year,

when, in fact, he knew that such investments involved a high degree of risk, that there was no reasonable basis for representing that limited partners would receive such returns on their investments, and that the limited partners could not and would not receive the represented returns on their investments because such funds would be diverted to his own use and benefit, which diversion he did in fact accomplish by:

(1) causing his wholly controlled corporation, defendant TRENTON H. PARKER & ASSOCIATES, INC., to receive as a sales commission 10% of all investor funds;

(2) causing to be installed defendant MANSION PROPERTIES CORPORATION as a general partner to the *Porter, Malo* and *Tears* limited partnerships and defendant MANSION PROPERTIES MANAGEMENT CORPORATION as a general partner to the *Croke* limited partnership;

(3) causing to be included a provision in the articles of limited partnership that permitted him, as general partner and control person of the corporate general partners, to retain and pay himself, and corporations which he controlled, for renovating and managing the mansions rather than retain and pay persons and business entities with which he was not affiliated, directly or indirectly;

(4) exercising the provision referred to in paragraph "(3)" above and making payments to him-

self and his corporations from partnership funds, which payments he described as leasing commissions, management fees, real estate sales commissions, restoration management fees [i.e., general contractor fees], building management fees, and salaries and overhead expenses attributable to employees of business entities controlled by him.

d. in a September, 1974 letter, and otherwise, represented to offerees and purchasers of the limited partnership interests that first year income tax write-offs of from 150% to 200% realistically could be realized, when, in fact, he had no reasonable basis for such a representation and limited partners who subsequently claimed such tax write-offs by use of tax forms furnished to them by PARKER were audited by the Internal Revenue Service and denied such tax write-offs in whole or in part.

e. represented to offerees and purchasers of limited partnership interests that he (PARKER) had chosen to use this investment as his own personal investment, when, in fact, he did not intend to and thereafter did not, invest any capital in any of the limited partnerships.

f. represented to offerees and purchasers of the limited partnership interests that the general partner(s) would maintain full and accurate books of account and that such books of account would be open for examination by the limited partners when, in fact, PARKER did not then intend, and thereafter failed, to make such books of account available to limited partners.

g. sent to limited partners, during the course of renovation and rental of the mansions, purported periodic accountings, financial statements, and reports representing that the projects were successful, even if substantially behind schedule, for the purpose of deceiving and lulling the limited partners into believing that their investments were safe and successful, and to forestall

and delay them: from making adequate inquiry into the operations of the limited partnerships; and from retaining counsel to (1) inquire into PARKER's failure to make available the books and records of the limited partnerships, (2) compel distribution to them of proceeds of the sale of the mansions owned by the limited partnerships, which mansions were sold in 1977 and 1978; and (3) file suit to remove PARKER, MANSION PROPERTIES MANAGEMENT CORPORATION, and MANSION PROPERTIES CORPORATION as general partners. In connection with the foregoing, and to frustrate the limited partners in their attempts to verify the financial status of the limited partnerships, PARKER omitted to state in periodic accountings' financial statements and reports, the identity of individuals and entities to whom he had made or was making payments with partnership funds.

h. other statements of similar purport and object.

27. In making and causing to be made the representations referred to in paragraph 26 above, and similar such statements, defendants PARKER, TRENTON H. PARKER & ASSOCIATES, INC., MANSION PROPERTIES CORPORATION, and MANSION PROPERTIES MANAGEMENT CORPORATION knowingly and wilfully omitted to state, and caused others to omit to state, material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, including, among other things, that the representations referred to in paragraph 26 above, which are hereby incorporated by reference, were false and misleading to the extent set forth therein.

28. By reason of the activities described in paragraphs 26 and 27 above, PARKER, TRENTON H. PARKER & ASSOCIATES, INC., MANSION PROPERTIES CORPORATION, and MANSION PROPERTIES MANAGEMENT CORPORATION violated Section 17(a) of the Securities

Act, Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

COUNT V

Violations by PARKER and TRENTON H. PARKER & ASSOCIATES, INC. of Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)], and Rule 15b3-1 promulgated thereunder [17 CFR § 240.15b3-1]

FAILURE TO COMPLY WITH REPORTING REQUIREMENTS REGARDING BROKER-DEALERS - AMENDMENTS TO FORM BD

29. Paragraphs 1 through 12 are hereby realleged and incorporated herein by reference.

30. On March 5, 1975, the registration of TRENTON H PARKER & ASSOCIATES, INC. as a broker-dealer became effective with the COMMISSION. As a registered and regulated entity this firm was and is subject to the reporting requirements of the Exchange Act and the rules promulgated thereunder.

31. On or about October 22, 1979, the Secretary of State for the State of Colorado issued a Certificate of Revocation thereby revoking the authority of TRENTON H. PARKER & ASSOCIATES, INC. to transact business within the state of Colorado.

32. TRENTON H. PARKER & ASSOCIATES, INC. failed to file, and Parker aided, abetted, counseled, commanded and induced defendant company in such failure to file, with Plaintiff COMMISSION amendments to the Form BD pertaining to TRENTON H. PARKER & ASSOCIATES, INC. to reflect that its application for registration had become inaccurate as a consequence of the events described in paragraph 31 above.

33. By reason of the activities described in this count, PARKER and TRENTON H. PARKER & ASSOCIATES,

INC. violated Section 15(b) of the Exchange Act and Rule 15b3-1 promulgated thereunder.

COUNT VI

Violation by PARKER and TRENTON H. PARKER & ASSOCIATES, INC. of Section 17(a) of the Exchange Act [15 U.S.C. § 78q(a)] and Rule 17a-5 promulgated thereunder [17 CFR § 240.17a-5]

FAILURE TO FILE AUDITED FINANCIAL STATEMENTS

34. Paragraphs 1 through 12 are hereby realleged and incorporated herein by reference.

35. Commencing March 5, 1975 and continuing to the date of this Complaint, TRENTON H. PARKER & ASSOCIATES, INC. has existed as a broker-dealer registered with the plaintiff COMMISSION subject to the reporting requirements of Section 17(a) of the Exchange Act and Rule 17a-5 promulgated thereunder. To date TRENTON H. PARKER & ASSOCIATES, INC. has failed to comply with the requirement of said rule that an audited financial statement be filed no later than February 29, 1980, and defendant PARKER has aided, abetted, counseled, commanded and induced defendant company to violate said section.

NEED FOR INJUNCTION

36. The defendants, unless enjoined, will continue to engage in the acts, practices and courses of business set forth in paragraphs 1 through 35 of this Complaint, and in acts, practices and courses of business of similar purport and object.

WHEREFORE, the plaintiff SECURITIES AND EXCHANGE COMMISSION respectfully prays for a preliminary injunction and final judgment:

I.

ENJOINING defendants THE INTERNATIONAL MINING EXCHANGE, INC., MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, TRENTON H. PARKER & ASSOCIATES, INC., and TRENTON H. PARKER, and their respective officers, directors, agents, servants, employees, attorneys, and those persons in active concert or participation with them, and each of them, directly or indirectly, from:

1. Making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to offer to sell through the use or medium of any prospectus, or otherwise, limited partnership interests in the Porter Mansion, Ltd., Malo Mansion, Ltd., Tears-McFarlane Mansion, Ltd., or Croke-Patterson-Campbell Mansion, Ltd., or investment contracts based upon gold tax shelter investment programs offered by THE INTERNATIONAL MINING EXCHANGE, INC., or any other security of any issuer whatsoever, unless and until a registration statement is in effect with the SECURITIES AND EXCHANGE COMMISSION as to such securities; or

2. Making use of any means or instruments of transportation or communication in interstate commerce, or of the mails, to sell securities, namely, limited partnership interests in the Porter Mansion, Ltd., Malo Mansion, Ltd., Tears-McFarlane Mansion, Ltd., or Croke-Patterson-Campbell Mansion, Ltd., or investment contracts based upon gold tax shelter investment programs offered by THE INTERNATIONAL MINING EXCHANGE, INC., or any other security of any issuer whatsoever, through the use or medium of any prospectus or otherwise, unless and until a registration statement is in effect with the SECU-

RITIES AND EXCHANGE COMMISSION as to such securities; or

3. Carrying such securities or causing them to be carried through the mails or interstate commerce by means or instruments of transportation or communication for the purpose of sale or delivery after sale, unless and until a registration statement is in effect with the SECURITIES AND EXCHANGE COMMISSION as to such securities.

Provided, however that nothing in the foregoing portion of the injunction shall apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act of 1933, as amended.

II.

ENJOINING the defendants THE INTERNATIONAL MINING EXCHANGE, INC., TRENTON H. PARKER & ASSOCIATES, INC., MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, and TRENTON H. PARKER, individually, and their respective officers, directors, agents, servants, employees, attorneys and assigns, and all persons in active concert or participation with them and each of them, from directly or indirectly, in connection with the sale, offer for sale, purchase, or offer to purchase, of securities, namely, limited partnership interests in the Porter Mansion, Ltd., Malo Mansion, Ltd., Tears-McFarlane Mansion, Ltd., and Croke-Patterson-Campbell Mansion, Ltd., and investment contracts of THE INTERNATIONAL MINING EXCHANGE, INC., or any other securities of any issuer whatsoever, making use of any means or instruments of transportation or communication in interstate commerce, or of the means or instrumentalities of interstate commerce, or of the mails, to employ any device, scheme or artifice to defraud, or to engage in any transaction, practice or course of conduct which operates or would operate

as a fraud or deceit upon purchasers, or to obtain money or property by means of untrue statements of material facts, or omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, concerning:

1. Remuneration, commission, profit, or other payment to be received by PARKER or any business entity in which he has a financial interest, controls, or is an officer, director, incorporator, or shareholder, where such remuneration, commission, profit, or other payment results directly or indirectly as a consequence of: (a) the sale of securities; (b) business operations of the issuer; or (c) business operations of the venture or enterprise financed by the sales of such securities.

2. Transactions which the issuer of these securities may engage in with officers, directors, controlling persons, affiliates, or financial shareholders of the issuer, including organizations in which any such person may have direct or indirect interests;

3. The financial condition of the issuer;

4. The assets of the issuer;

5. Contracts between the issuer and any other corporation, business entity, or other person;

6. Profits to be made by purchasing these securities;

7. The total amount of money invested in an offering of securities;

8. The safety of an investment in securities;

9. The use to which proceeds of securities transactions are to be put;

10. The availability and existance of federal income tax deductions resulting from purchase of the securities;

11. Any other other untrue statement or omission of similar purport or object.

III.

ENJOINING the defendants TRENTON H. PARKER & ASSOCIATES, INC. and TRENTON H. PARKER from, directly or indirectly:

1. Failing to file with plaintiff SECURITIES AND EXCHANGE COMMISSION amendments to Form BD correcting inaccurate information therein and contained, as required by Section 15(b) of the Exchange Act [15 U.S.C. § 78o(b)] and Rule 15b3-1 promulgated thereunder [17 CFR § 240.15b3-1] while defendant TRENTON H. PARKER & ASSOCIATES, INC. is registered with the plaintiff SECURITIES AND EXCHANGE COMMISSION as a broker and/or dealer pursuant to Section 15 of the Exchange Act; or

2. Failing to file with plaintiff COMMISSION audited financial statements required by Section 17(a) of the Exchange Act [15 U.S.C. § 78q(a)] and Rule 17a-5 promulgated thereunder [17 CFR § 240.17a-5] while defendant TRENTON H. PARKER & ASSOCIATES, INC. is registered with the plaintiff COMMISSION as a broker and/or dealer pursuant to Section 15 of the Exchange Act.

IV.

ENJOINING the defendant TRENTON H. PARKER from aiding, abetting, counseling, commanding or inducing the corporate entities named as defendants hereto to do any of the things which such corporate defendants may

be restrained or enjoined from doing, or aiding, abetting, counseling, commanding or inducing any other issuer, broker, dealer or investment adviser in securities in engaging in any acts or practices of the type in which such corporate defendants may be restrained or enjoined from engaging.

V.

ENJOINING defendants TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., MANSION PROPERTIES CORPORATION, MANSION PROPERTIES MANAGEMENT CORPORATION, and TRENTON H. PARKER & ASSOCIATES, INC., individually, and their respective officers, directors, agents, servants, employees, successors, attorneys, assigns, and those persons in active concert or participation with them, and each of them, from directly or indirectly altering, destroying, concealing, disposing of, dissipating, transferring or removing any books, records, documents, correspondence, funds or assets of any of the above named defendants.

VI.

That this Court further ORDER:

1. TRENTON H. PARKER to file an accounting with the Court setting forth all funds received by himself individually, directly or indirectly, or received by or through any affiliate or business entity which he controls or in which he has a financial interest, including, but not limited to, THE INTERNATIONAL MINING EXCHANGE, INC., TRENTON H. PARKER & ASSOCIATES, INC., MANSION PROPERTIES CORPORATION, and MANSION PROPERTIES MANAGEMENT CORPORATION, from or as a consequence of the sales of securities issued by or relating to Porter Mansion, Ltd., Malo Mansion, Ltd., Tears-McFarlane Mansion, Ltd., Croke-Patterson-Campbell Mansion, Ltd., or THE INTERNATIONAL MINING EXCHANGE, INC.;

2. that such accounting set forth fully the uses to which any such funds were put, including the names of any individuals or business entities which received such funds or portions thereof; the amount and location of any remaining fund; all assets, liabilities, and business transactions which to any extent whatever would be legally determinative of funds, profits, proceeds, or other return of capital to which purchasers of the within named securities are entitled;

3. a full accounting regarding purchase, renovation, rental, and sale of the four above mentioned mansions, such accounting to be sufficiently specific to enable a determination of the amount of money accruing directly or indirectly to TRENTON H. PARKER's benefit; and

4. a full accounting regarding funds received from the sale of investment contracts offered by THE INTERNATIONAL MINING EXCHANGE, INC., such accounting sufficiently detailed to enable a determination of funds accruing directly or indirectly to the benefit of TRENTON H. PARKER or any business entity which he controls or in which he holds a financial interest, and of sufficient detail to enable a determination by purchasers of the investment contracts of the federal income tax deductions to which they are entitled.

VII.

Such other and further relief as the Court may direct.

/s/Robert H. Davenport

John J. Kelley, Jr.

Richard S. Vermeire

Susan Keesen

Edward A. Lewkowski

Attorneys for Plaintiff
Securities and Exchange Commission
410 Seventeenth Street, Suite 700
Denver, Colorado 80202
(303) 837-2071

APPENDIX E

In re:

UNITED STATES
v.
TRENTON H. PARKER and INTERNATIONAL MINING EXCHANGE

Criminal Case Nos.: 81-CR-122
82-CR-28

Statutes:	Parker:	188 U.S.C. §§ 1341, 1343 and 1623 26 U.S.C. §§ 7206(2) and 7203
	IME:	18 U.S.C. § 1341 and 1343 26 U.S.C. § 7203
Penalty:	Parker	Count I—18 U.S.C. § 1341 NMT 5 years—NMT $5000—or both
		Count XI—26 U.S.C. § 7206(2) NMT 3 years—NMT $5,000—or both plus Costs of Prosecution
		Count I—Indictment of 82-CR-28 (18 U.S.C. § 1623) NMT 5 years—NMT $10,000—or both
		Count XVII—26 U.S.C. § 7203 NMT 1 year—NMT $10,000—or both plus Costs of Prosecution
		Count XIX—26 U.S.C. § 7203 NMT 1 year—NMT $5,000—or both plus Cost of Prosecution

IME:

Count I—18 U.S.C. § 1341 NMT 5 years—NMT $5,000—or both

Count VII—18 U.S.C. § 1343 NMT 5 years—NMT $5,000—or both

Count XX—26 U.S.C. § 7203 NMT 1 year—NMT $10,000—or both plus Costs of Prosecution

Plea Agreement:

The defendant TRENTON H. PARKER will plead guilty to Counts, I, XI, XVII and XIX of Indictment 81-CR-122 and Count I of Indictment 82-CR-28. The government will dismiss Counts II thru X, XII thru XVI, XVIII and XX of Indictment 81-CR-122 and Indictment 82-CR-27.

The defendant I.M.E. will plead guilty to Counts, I, VII and XX. The government will dismiss Counts II thru VI and VIII thru XIX.

Both defendants will immediately turn over to the custody of a court-appointed receiver all remaining proceeds of the scheme to defraud, all records indicating deposits and/or expenditures of all funds under their control. Both defendants will fully cooperate with a court-appointed receiver in his plans for restitution and fair distribution of funds to victims of the scheme. The court is not a party to this agreement nor bound by its terms pursuant to Rule 11, Fed.R.Crim.Procedure.

The government will not make any specific recommendations as to an appropriate sentence to be imposed. Sentencing will be a matter left to the discretion of the court. The government reserves the right to make known to the court all the facts involved in the scheme to defraud and to exercise its right of allocation under Rule 32(a)(1) of the Fed.R.Crim.Procedure.

APPENDIX F

STATUTORY AND CONSTITUTIONAL PROVISIONS

Constitution of the United States of America Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 3651 Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on a probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the

defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: Provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or be-

cause his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title [18 USCS § 4251(a)], or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201) [42 USCS § 201(q)], as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title [18 USCS § 4255] for all or part of the period of probation: Provided, That the Attorney General certifies a suitable program is available. If the Attorney General determines that the person's participation in the program should be terminated, because the person can derive no further significant benefits from participation or because his participation adversely affects the rehabilitation of other participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

§ 46 Assignment of judges; panels; hearings; quorum

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the

chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, nothwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

No. 86-1664

Supreme Court, U.S.
FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

ROBERT C. HERZFELD, et al.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ELIZABETH EKEN, et. al.

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Dines and English
685 Van Houten Avenue
Clifton, New Jersey
Telephone: (201) 778-7575

Attorneys for Elizabeth Eken, et. al., as Representatives of the Class of Investors Defrauded by Trenton H. Parker and International Mining Exchange, Inc.

Patrick C. English, Esq.
On The Brief

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PARTIES

Though not indicated in the caption of the petition, Elizabeth Eken, et. al., as representatives of the Class of Investors defrauded by Trenton H. Parker and International Mining Exchange, Inc., were appellees before the United States Court of Appeals for the Tenth Circuit and are proper parties-respondents herein.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-1664

ROBERT C. HERZFELD, in his individual and custodial capacity; MARSHALL BERNES, TEARS McFARLAND, LTD., a Colorado Limited Partnership; CROKE-PATTERSON-CAMPBELL MANSION, LTD., a Colorado Limited Partnership; MALO MANSION, LTD., a Colorado Limited Partnership; and K.A.I. CASIMALLY,

Petitioners,

v

UNITED STATES OF AMERICA,

Respondent.

ELIZABETH EKEN, et. al.

Respondents.

BRIEF IN OPPOSITION TO
WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
TENTH CIRCUIT

STATEMENT OF THE CASE

It should be noted that facts as recited in the petition were in sharp dispute at the trial level. However, the District Court and the Tenth Circuit both accepted petitioners' version of the facts for the purposes of the motion only. In the event of reversal there would be a remand for a hearing to determine the facts.

It should be noted that petitioners claims arise solely from judgments against Trenton H. Parker, individually, and not from judgments against International Mining Exchange, Inc.

It should also be noted that Trenton H. Parker was not the

sole defendant in the criminal case in which the restitutitionary fund was created. Also on trial and an integral part of the plea agreement was the International Mining Exchange, Inc. ("I.M.E."). The plea agreement provides that "Both defendants" will immediately turn over to the custody of a court appointed receiver the remaining proceeds of the scheme to defraud [which was the subject of the indictment]. (emphasis added) See Pa 45-48. (Exhibit E).

REASONS TO DENY THE PETITION

Petitioners Had No Judgment Against International Mining Exchange, Inc.

Since a party to the agreement resulting in the

restitutionary scheme and since petitioners' claims are not based upon any judgment against I.M.E., it was eminently within the discretion of the District Court to limit its restitutionary orders to those individuals defrauded by both Trenton H. Parker and International Mining Exchange, Inc. Indeed, there would appear to be no authority under 18 U.S.C. §3651 to do otherwise since restitution could only be ordered to the "aggrieved party for actual damages or loss caused by the offense for which conviction was had."

This might be a different case if Trenton H. Parker had been the only defendant in the criminal case from which the restitutionary scheme was created. If Mr. Parker

had been the sole criminal defendant then the allegation that one group of creditors was being favored over another might be properly raised. However, this is simply not the factual situation.

Petitioners have failed to show that the decisions below are in conflict with those of other circuits, or conflict with a state court of last resort, or that any important question of federal law is involved. Certainly no conflict has been alleged to exist with regard to any decision of this Court. See, Rule 17.

It is respectfully submitted that the Petition for Writ of Certiorari in this matter should therefore be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

DINES AND ENGLISH
Patrick C. English, Esq.
685 Van Houten Avenue
Clifton, New Jersey 07013
Telephone: (201) 778-7575

Attorneys for the Class of Investors Defrauded by Trenton H. Parker and International Mining Exchange, Inc.